

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No.: 10/667,225 Confirmation No.: 7016
Applicant(s): Joseph J. Estwanik
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Art Unit: 3764
Examiner: Lori Baker Amerson
Title: LOWER EXTREMITY STRETCHING DEVICE

Docket No.: 051586/310309
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Commissioner for Patents
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APPEAL BRIEF UNDER 37 CFR § 41.37

This Appeal Brief is filed pursuant to the "Notice of Appeal to the Board of Patent Appeals and Interferences" filed June 18, 2007. A previous Notice of Appeal was filed on October 9, 2006, and an Appeal Brief was filed on December 6, 2006. In response, the Examiner withdrew the finality of the previous Office Action, reopened prosecution, and issued a new Office Action that was mailed on March 19, 2007.

1. ***Real Party in Interest.***

The real party in interest in this appeal is Joseph J. Estwanik.

2. ***Related Appeals and Interferences.***

There are no related appeals and/or interferences involving this application or its subject matter.

3. ***Status of Claims.***

The present appeal involves Claims 1-19. Claims 14, 15, and 19 have been allowed, and Claims 4, 10, and 17 have been objected to as being dependent on a rejected base claim but would be allowable if rewritten in independent form. Claims 1, 2, 5-8, 11-13, 16, and 18 are

presently under a non-final rejection, as set forth by the Official Action mailed March 19, 2007. The claims at issue are set forth in the attached Claims Appendix.

4. *Status of Amendments.*

No amendments have been made subsequent to the final Official Action of July 10, 2006.

5. *Summary of Claimed Subject Matter.*

Embodiments of the present invention provide apparatus and methods for stretching a user's leg muscles. In particular, independent Claims 1, 7, 12, and 14 recite a rocker device **20** having a pair of lower rocking surfaces **30** that are arcuately shaped with a constant radius for rocking motion on a generally flat surface (FIGS. 1 and 4; ¶¶ 8, 11, and 24). Independent Claims 1, 7, 12, and 14 also recite that the rocker device **20** includes an upper platform surface **40** extending between opposing ends of a respective rocking surface **30** (FIGS. 1, 2, and 4; ¶¶ 8, 11, and 25). Moreover, independent Claims 1, 7, 12, and 14 recite that a recess **50** is defined between the rocking surfaces **30** by substantially only two angularly converging platform surfaces **60** fixedly attached between the lower rocking surfaces and the respective upper platform surfaces **40** (FIGS. 1 and 2; ¶¶ 8, 11, and 25).

As also recited in Claims 1 and 12, the recess **50** is defined to receive a user's knee in a bent condition of the user's leg for stretching the user's quadriceps upon rocking motion (FIG. 3; ¶¶ 8, 9, 11-13, 25, 29, and 31). The method of independent Claim 12 further recites the steps of resting the rocking surface **30** on a generally flat surface, placing a user's knee in bent condition in the recess **50** of the upper platform surface **40**, and rocking the apparatus backwards and forwards using the user's knee in the recess **50** to guide the rocking motion of the rocker device **20** (FIG. 3; ¶¶ 9, 13, 29, and 31).

Independent Claims 7 and 14 recite that the rocker device **20** is alternatively positionable between first and second positions (FIGS. 1, 3, 4, 5A, and 5B; ¶¶ 10-13 and 26-28). In this regard, Claim 7 recites that the first position corresponds to a position where the lower rocking surface **30** rests on a generally flat surface allowing the user to position the user's knee in a bent condition of the user's leg in the recess **50** of the upper platform surface **40** for stretching the

user's quadriceps upon rocking motion (FIG. 3; ¶¶ 11, 12, and 25). Independent Claim 7 recites that the second position corresponds to a position where the upper platform surface **40** rests on a generally flat surface allowing a user to position alternatively the user's heel of the user's leg on at least a portion of at least one of the angularly converging platform surfaces **60** for stretching the user's hamstring muscle or to position the user's foot of the user's leg on at least a portion of one of the angularly converging platform surfaces **60** for stretching the user's calf muscle (FIGS. 4, 5A, and 5B; ¶¶ 11, 12, 25, and 26).

The method of Claim 14 similarly recites stretching the user's quadriceps muscle in the first position by placing a user's knee in a bent condition in the recess **50** of the upper platform surface **40** and rocking the device **20** backwards and forwards using the user's knee in the recess **50** to guide the rocking motion of the device **20** for stretching the quadriceps muscles (FIG. 3; ¶¶ 9, 10, 13, and 29-31). Furthermore, independent Claim 14 recites stretching the hamstring muscles in the second position by placing a heel of one of the user's outstretched legs on at least a portion of at least one of the angularly converging platform surfaces **60** and leaning forward towards the device **20** for stretching the hamstring muscles (FIG. 5A; ¶¶ 10, 13, 30, and 31). In addition, Claim 14 recites stretching the calf muscles in the second position by placing one foot of the user's leg on at least a portion of one of the angularly converging platform surfaces **60** while maintaining contact with the generally flat surface with the heel of the user's foot for stretching the calf muscles (FIG. 5B; ¶¶ 10, 13, 30, and 31).

Dependent Claims 4 and 10 recite that at least one of the angularly converging platform surfaces **60** have at least one indentation **55** for receiving the user's shin bone when the user's knee is received in the recess **50** in a bent condition (FIGS. 1 and 2; ¶¶ 11 and 24). Similarly, dependent Claim 17 recites that the at least one indentation **55** is defined in, and extends substantially along, a respective angularly converging platform surface **60** (FIG. 2; ¶¶ 11 and 24). Additionally, dependent Claim 6 recites that a substantial portion of each upper platform surface **60** is configured to rest on a generally planar surface (FIGS. 4, 5A, and 5B; ¶¶ 11, 12, and 25). Similarly, dependent Claim 18 recites that each upper platform surface **60** is substantially planar (FIGS. 1-5; ¶¶ 11, 12, and 25).

6. ***Grounds of Rejection to be Reviewed on Appeal.***

Claims 1, 2, 5-8, 11-13, 16, and 18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 3,526,429 to Metzger in view of U.S. Patent No. D320,701 to Hoff.

7. ***Argument.***

Rejection of Claims 1, 2, 5-8, 11-13, 16, and 18 under 35 U.S.C. § 103(a) as being unpatentable over Metzger and Hoff

(a) Independent Claims 1, 7, and 12

Applicant submits that the prior art relied upon in rejecting Claims 1, 2, 5-8, 11-13, 16, and 18 is non-analogous art for purposes of an obviousness rejection under 35 U.S.C. § 103(a). “Any analogous or pertinent prior art plays a role in the determination of the patentability of the claims at the time of invention.” *Beckson Marine, Inc. v. NFM, Inc.*, 292 F.3d 718, 726 (Fed. Cir. 2002). A prior art reference is analogous if the reference is in the field of applicant’s endeavor or, if not, the reference is reasonably pertinent to the particular problem with which the inventor was concerned. *In re Oetiker*, 977 F.2d 1443, 1446 (Fed. Cir. 1992).

In this vein, Metzger and Hoff relate to rocking chairs. As such, Applicant respectfully submits that the cited art, which generally relates to rocking chairs, is clearly non-analogous art. Rocking chairs are not “reasonably pertinent” to solving the problem of properly stretching a user’s leg muscles and are inapplicable to injury prevention and treatment of said muscles. In particular, rocking chairs are configured to accommodate a subject in a seated position, while the claimed invention relates to accommodating a portion of a subject’s leg in a manner that properly stretches the quadriceps, or that may be alternatively used to stretch the user’s hamstring or calf muscles. The anatomical differences required to stretch a user’s leg muscles versus simply accommodating a seated subject are clearly unrelated and, therefore, the problems to be solved are also unrelated. As such, Applicant submits that the cited references are not “reasonably pertinent” to the problem to be solved and are, thus, non-analogous art, and should not be relied upon in rejecting independent Claims 1, 7, and 12.

Furthermore, Applicants disagree that any of the cited references, taken alone or in combination, disclose independent Claims 1, 7, and 12. For instance, independent Claim 1 recites that the apparatus includes a recess defined for receiving a user's knee in a bent condition for stretching the user's quadriceps upon rocking motion. The Examiner contends that Metzger discloses the capability to receive a user's knee in a bent condition for stretching the user's quadriceps upon rocking motion.

Applicant respectfully disagrees and submits that neither Metzger nor Hoff, alone or in combination, discloses an apparatus or method for stretching a user's leg muscles. In particular, none of the cited references discloses a rocker device including a recess defined between a pair of rocking surfaces for receiving a user's knee in a bent condition of the user's leg for stretching the user's quadriceps upon rocking motion, as recited by Claim 1. Similarly, none of the cited references discloses resting the lower rocking surface on a generally flat surface, placing a user's knee in a bent condition in the recess of the upper platform surface, and rocking the apparatus backwards and forwards using the user's knee in the recess to guide the rocking motion of the rocker device for stretching the quadriceps muscles, as recited by independent Claim 12. Moreover, none of the cited references teaches or suggests allowing the user to position the user's knee in a bent condition of the user's leg in the recess of the upper platform surface for stretching the user's quadriceps upon rocking motion and allowing a user to position alternatively the user's heel of the user's leg on at least a portion of at least one of the angularly converging platform surfaces for stretching the user's hamstring muscle or to position the user's foot of the user's leg on at least a portion of one of the angularly converging platform surfaces for stretching the user's calf muscle, as recited by independent Claim 7.

Applicants submit that the Examiner has failed to demonstrate that stretching a user's leg muscles as defined by the claimed invention is taught or suggested by the rockable furniture of the cited references; there is simply no basis or technical reasoning to suggest otherwise. For example, Metzger discloses a rocking chair that, as shown in FIGS. 4-6, is configured to accommodate a person in a seated position, and the chair does not include a recess defined by angularly converging surfaces that could receive a user's knee in a bent condition in order to stretch a user's quadriceps. Similarly, Hoff discloses a rocking chair having a seat and seatback

configured to receive a person in a seated position. Thus, Hoff also does not teach or suggest a recess defined by a pair of angularly converging platform surfaces for receiving a user's knee in a bent condition that would facilitate the proper stretching of a user's quadriceps. The angularly converging surfaces of the claimed invention are configured to receive a user's knee and stretch a user's quadriceps, which is simply not taught or suggested by the rocking chairs of Metzger and/or Hoff. As such, even if the cited references were combined, the combination fails to teach or suggest each of the recitations of independent Claims 1, 7, and 12.

Therefore, Applicant submits that the rejection of independent Claims 1, 7, and 12 under 35 U.S.C. § 103(a) is overcome. Because each of the dependent claims includes the limitations of a respective independent claim, the dependent claims are allowable for at least those reasons discussed above.

(b) Dependent Claims 6 and 18

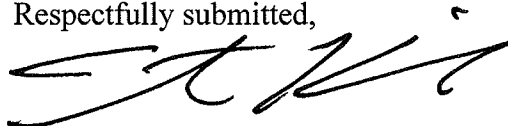
Additionally, none of the cited references teaches or suggests that a substantial portion of each upper platform surface is configured to rest on a generally planar surface, as recited by dependent Claim 6. Similarly, none of the cited references, taken alone or in combination, teaches or suggests that each upper platform surface is substantially planar, as recited by dependent Claim 18. In this regard, Metzger and Hoff disclose curving or non-planar edges extending between respective rocking surfaces. For instance, see the arcing longitudinal edges of side frames (10, 12, 14) in FIG. 2 of Metzger, and the non-planar edges in FIG. 2 of Hoff. In contrast, Claim 18 recites that each upper platform surfaces extending between respective rocking surfaces is substantially planar, while Claim 6 recites that a substantial portion of each upper platform surface is configured to rest on a generally planar surface.

As dependent Claims 6 and 18 depend from independent Claim 1, Claims 6 and 18 are distinguishable from any combination of the cited references for the reasons described above in conjunction with Claim 1. Additionally, Applicants submit that dependent Claims 6 and 18 are further distinguishable over the cited references, taken individually or in combination, for at least those additional reasons discussed above.

CONCLUSION

For the above reasons, it is submitted that the rejections of Claims 1, 2, 5-8, 11-13, 16, and 18 are erroneous and reversal of the rejections is respectfully requested. A Claims Appendix containing a copy of claims involved in the appeal, an Evidence Appendix, and a Related Proceedings Appendix are attached.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Trent A. Kirk', written in a cursive style.

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Claims Appendix.

1. (Previously Presented) An apparatus for stretching a user's leg muscles, comprising a rocker device having at least a pair of lower rocking surfaces that are arcuately shaped with a constant radius for rocking motion on a generally flat surface and an upper platform surface extending between opposing ends of a respective rocking surface, wherein a recess is defined between the rocking surfaces by substantially only two angularly converging platform surfaces fixedly attached between the lower rocking surfaces and respective upper platform surfaces for receiving a user's knee in a bent condition of the user's leg for stretching the user's quadriceps upon rocking motion.
2. (Original) An apparatus in accordance with claim 1, wherein the recess is cushioned.
3. (Original) An apparatus in accordance with claim 1, wherein the rocker device has at least one handle for transporting the rocker device.
4. (Previously Presented) An apparatus in accordance with claim 1, wherein at least one of the angularly converging platform surfaces has at least one indentation for receiving the user's shin bone when the user's knee is received in the recess in a bent condition.
5. (Previously Presented) An apparatus in accordance with claim 1, wherein the two platform surfaces are attached at an angle of approximately 90 degrees to one another for receiving a user's knee in bent condition.
6. (Previously Presented) An apparatus in accordance with claim 1, wherein a substantial portion of each upper platform surface is configured to rest on a generally planar surface allowing a user alternatively to position the user's heel of the user's leg on at least a portion of at least one of the angularly converging platform surfaces for stretching the user's

hamstring muscle or to position the user's foot of the user's leg on at least a portion of one of the angularly converging platform surfaces for stretching the user's calf muscle.

7. (Previously Presented) An apparatus for stretching a user's leg muscles, comprising a rocker device having at least a pair of lower rocking surfaces that are arcuately shaped with a constant radius for rocking motion and an upper platform surface extending between opposing ends of a respective rocking surface, wherein a recess is defined between the rocking surfaces by substantially only two angularly converging platform surfaces fixedly attached between the lower rocking surface and the upper platform surface, said rocker device being alternatively positionable between

a first position wherein the lower rocking surface rests on a generally flat surface allowing the user to position the user's knee in a bent condition of the user's leg in the recess of the upper platform surface for stretching the user's quadriceps upon rocking motion, and

a second position wherein the upper platform surface rests on a generally flat surface allowing a user to position alternatively the user's heel of the user's leg on at least a portion of at least one of the angularly converging platform surfaces for stretching the user's hamstring muscle or to position the user's foot of the user's leg on at least a portion of one of the angularly converging platform surfaces for stretching the user's calf muscle.

8. (Original) An apparatus in accordance with claim 7, wherein the recess is cushioned.

9. (Original) An apparatus in accordance with claim 7, wherein the rocker device has at least one handle for transporting the rocker device.

10. (Previously Presented) An apparatus in accordance with claim 7, wherein at least one of the angularly converging platform surfaces has at least one indentation for receiving the user's shin bone when the user's knee is received in the recess in a bent condition.

11. (Previously Presented) An apparatus in accordance with claim 7, wherein the two platform surfaces are attached at an angle of approximately 90 degrees to one another for receiving a user's knee in bent condition.

12. (Previously Presented) A method of stretching a user's leg muscles using an apparatus comprising a rocker device having at least a pair of lower rocking surfaces that are arcuately shaped with a constant radius for rocking motion on a generally flat surface and an upper platform surface extending between opposing ends of a respective rocking surface, wherein a recess is defined between the rocking surfaces by substantially only two angularly converging platform surfaces fixedly attached between the lower rocking surface and the upper platform surface for receiving a user's knee in a bent condition of the user's leg for stretching the user's quadriceps upon rocking motion, the method comprising the steps of:

- a. resting the lower rocking surface on-a generally flat surface;
- b. placing a user's knee in a bent condition in the recess of the upper platform surface; and
- c. rocking the apparatus backwards and forwards using the user's knee in the recess to guide the rocking motion of the rocker device for stretching the quadriceps muscles.

13. (Previously Presented) A method in accordance with claim 12, wherein the two platform surfaces are attached at an angle of approximately 90 degrees to one another for receiving a user's knee in bent condition.

14. (Previously Presented) A method of stretching a user's leg muscles, the method comprising the steps of:

- a. providing a device having at least a pair of lower rocking surfaces that are arcuately shaped with a constant radius for rocking motion and an upper platform surface extending between opposing ends of a respective rocking surface, wherein a recess is defined between the rocking surfaces by substantially only two angularly converging platform surfaces fixedly attached between the lower rocking surface and the upper platform surface;

b. selectively positioning the device in a first position wherein the lower rocking surface rests on a generally flat surface or a second position wherein the upper platform surface rests on a generally flat surface; and

c. selectively stretching the user's leg muscles by:

i. stretching the quadriceps muscles in said first position by:

A. placing a user's knee in a bent condition in the recess of the upper platform surface; and

B. rocking the device backwards and forwards using the user's knee in the recess to guide the rocking motion of the device for stretching the quadriceps muscles; or

ii. stretching the hamstring muscles in said second position by:

A. placing a heel of one of the user's outstretched legs on at least a portion of at least one of the angularly converging platform surfaces; and

B. leaning forward towards the device for stretching the hamstring muscles; or

iii. stretching the calf muscles in said second position by placing one foot of the user's leg on at least a portion of one of the angularly converging platform surfaces while maintaining contact with the generally flat surface with the heel of the user's foot for stretching the calf muscles.

15. (Previously Presented) A method in accordance with claim 14, wherein the two platform surfaces are disposed at an angle of approximately 90 degrees to one another for receiving a user's knee in bent condition.

16. (Previously Presented) An apparatus in accordance with claim 1, wherein the lower rocking surface is semi-circular.

17. (Previously Presented) An apparatus in accordance with claim 4, wherein at least one indentation is defined in, and extends substantially along, a respective angularly converging platform surface.

18. (Previously Presented) An apparatus in accordance with claim 1, wherein each upper platform surface is substantially planar.

19. (Previously Presented) A method in accordance with claim 12, wherein each upper platform surface is substantially planar.

Evidence Appendix.

No additional evidence is provided.

Related Proceedings Appendix.

There are no related proceedings.